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In the Matter of:

KETCHIKAN PULP COMPANY,

Respondent.

[TSCA]

Docket No. 1094-04-07-2615

**CROSS MOTION FOR PARTIAL  
ACCELERATED DECISION AND  
RESPONSE TO COMPLAINANT'S  
MOTION**

Ketchikan Pulp Company (KPC) responds to the complainant's Motion for Partial Accelerated Decision on Liability and cross moves for the same. KPC understands that the complainant is not moving for a determination of a penalty and therefore does not address any penalty issues. KPC has a motion pending before the administrative law judge to amend its answer to deny the allegations asserted in paragraph 24 of the complaint. Although in its motion the complainant has relied on KPC's inadvertent failure to deny paragraph 24, it does not oppose KPC's motion to amend. Since leave to amend pleadings is generally granted freely, KPC respectfully requests that the judge disregard the complainant's treatment in its motion of paragraph 24 as admitted.

PCB activities at KPC are overseen by Cyril J. Young, the Assistant Director of Environmental Control. KPC has been undertaking the phased removal of all PCB equipment from its operations over the last few years. KPC takes seriously its responsibility to manage PCB activity and expends considerable effort at doing so. At KPC, the preparation of the PCB annual

document logs is an organized and deliberate activity. Since the regulations do not specify how such documents are to be prepared, KPC prepared annual document logs that consisted of two volumes. The first volume consisted of a memorandum and attached documents. The second volume consisted of copies of the manifests that were referenced in the first volume. KPC used this format until requested by the Region 10 office of the U.S. Environmental Protection Agency (EPA) to adopt a different format. See generally Affidavit of Cyril J. Young.

KPC has used Boyer Alaska Barge Line, Inc. (Boyer) for many years to transport hazardous waste from its Alaskan operations to the continental United States for disposal. This company has a history of responsible transportation practices and has always transported wastes without incident. In 1991 and 1992, KPC hired Boyer to transport PCB wastes. Boyer provided KPC with the EPA identification number "AKD126916782." Id. This number has the same format as the identification numbers that EPA assigns to transporters who request a number before commencing PCB-related activities. Therefore, KPC had no reason to suspect that this was not the proper number to use in preparing the manifest. However, the agency apparently issued this particular number in response to Boyer's request for an identification number for hazardous waste activity.

#### ANNUAL DOCUMENT LOGS AND ANNUAL DOCUMENT

The complainant charges that KPC failed to include all the information required by 40 C.F.R. § 761.180(a) in the annual

document logs for 1990, 1991, and 1992 and the annual document for 1989 because these documents rely on incorporated material to satisfy some of the informational requirements. Complainant's Brief at 6. Since the regulations do not provide fair notice as to how information is to be incorporated into annual document logs and annual documents, the complainant may not punish KPC for choosing to prepare parts of its documents by incorporating some pre-existing material.

The PCB recordkeeping requirements, as described at 40 C.F.R. § 761.180, require owners or operators of facilities that use or store more than 45-kilograms of PCBs in containers or transformers to develop and maintain an annual document log. The regulations specify no format for these documents nor do they mandate any particular method of compilation or assembly. KPC's annual document logs for 1990, 1991, and 1992 and the annual document for 1989 were assembled using a combination of materials. Some material was drafted especially for the annual document logs and the annual document, and other material had been drafted to satisfy other requirements but was suitably formatted for incorporation into the annual document logs and the annual document. EPA never provided KPC with any formal or informal guidance on how to develop annual document logs prior to the pendency of this administrative action. Affidavit of Cyril J. Young at ¶ 4.

The apparent purpose of the annual document log and the annual document is to: (1) assist the facility in monitoring its



1 PCB activity and (2) to facilitate the review of PCB-related  
2 information by the agency. The annual document logs and the  
3 annual document, as drafted by KPC, accomplishes the informa-  
4 tional purpose adequately. KPC and the agency could use these  
5 documents as a readily accessible source of information about the  
6 management of PCB activities. Under well established principles  
7 of due process, the agency is obligated to draft its regulations  
8 with sufficient clarity to enable ordinary persons to ascertain  
9 the conduct required of them. General Electric Co. v. U.S.  
10 Environmental Protection Agency, 53 F.3d 1324 (D.C. Cir. 1995);  
11 United States v. Murphy, 809 F.2d 1427 (9th Cir. 1987). Since  
12 the PCB regulations do not prohibit the development of annual  
13 document logs by incorporating material, the counts associated  
14 with the annual document logs and annual document must fail.

15 The annual document logs as prepared by KPC contained the  
16 information required by 40 C.F.R. § 761.180. For instance,  
17 volume two of the annual document logs for 1990, 1991, and 1992  
18 contain the unique identifying number for each PCB container and  
19 the serial number of each PCB article manifested for disposal,  
20 the total weight of material in each PCB container and article  
21 manifested for disposal, the date material was removed from  
22 service for disposal, and the address of the facility. See  
23 Respondent's exhibits RX1b, RX2b, and RX3b. The total number of  
24 large high or low voltage capacitors is described in volume one  
25  
26  
27  
28

1 of each document log.<sup>1</sup> See Respondent's exhibits RX1a, RX2a, and  
2 RX3a.

3 With respect to the annual document for 1989, the dates that  
4 the PCBs and PCB items were removed from service are provided on  
5 the PCB Equipment Log and Quarterly Report which is part of the  
6 annual document. The weight in kilograms of PCBs and PCB items  
7 manifested for disposal is provided on the manifests that are  
8 also part of the annual document. Information on the capacitors  
9 remaining in service is included in the PCB Equipment Log and  
10 Quarterly Report. Since it is infeasible to determine the weight  
11 of the PCBs in its capacitors, KPC has assumed that they qualify  
12 for treatment as large high or low voltage capacitors under the  
13 regulations.

14 The thrust of the complainant's position appears to be that  
15 KPC should have retyped the existing lists containing the infor-  
16 mation regarding PCB activity rather than incorporate them into  
17 the annual document logs. However, 40 C.F.R. § 761.180 does not  
18 specify such a requirement. This is not a situation where a  
19 facility has not compiled an annual document log or annual  
20 document but has the information available to develop such  
21 documents. Cf. In re Marcal Paper Mills, Inc., Docket No.TSCA-

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22  
23  
24 <sup>1</sup> The PCB capacitors at KPC were installed in 1954 and are  
25 sealed units. Since the configuration and lack of manufacturer  
26 specifications makes it impossible to determine the weight of PCB  
27 material in these units, KPC is unable to ascertain whether they  
28 are large capacitors as defined in 40 C.F.R. § 761.3. Therefore,  
all such units are presumed to be large capacitors for record-  
keeping purposes. Affidavit of Cyril J. Young at ¶ 5.



1 PCB-II-91-0110 (April 20, 1993). KPC formally compiled these  
2 documents making partial use of pre-existing but suitably format-  
3 ted material. Therefore, counts one through four of the com-  
4 plaint should be dismissed.

5 **OFFERING PCB WASTE TO A TRANSPORTER WITHOUT**  
6 **AN EPA IDENTIFICATION NUMBER AS DEFINED BY 40 C.F.R. § 761.3**

7 The complainant alleges that KPC offered PCB waste to a  
8 transporter, Boyer Alaska Barge Line, Inc. (Boyer), which did not  
9 have an identification number as defined by 40 C.F.R. § 761.3.  
10 This number is a twelve-digit identification number that is  
11 assigned by the agency after the transporter submits form 7710-  
12 53. 40 C.F.R. § 761.205(a). KPC requested such a number from  
13 Boyer at the time it prepared its manifests and was given a  
14 twelve-digit number "AKD126916782." Affidavit of Cyril J. Young  
15 at ¶ 7. This apparently was the twelve digit number that the  
16 agency assigns after a transporter requests an EPA identification  
17 number before transporting hazardous wastes regulated under the  
18 Resource Conservation and Recovery Act (RCRA). See 40 C.F.R. §  
19 263.11. There is nothing ostensibly different about the twelve-  
20 digit number issued pursuant to the PCB regulations or the RCRA  
21 regulations that would enable a generator to identify the partic-  
22 ular program under which the number was issued. The identifica-  
23 tion numbers issued under either set of regulations begin with  
24 three letters designating a State and end with nine numbers.  
25 There is no discernable difference between the identification  
26 numbers that indicates the activities to which they apply. The  
27  
28

1 only difference between the identification numbers is that one is  
2 requested by submitting form 7710-53 and the other by form 8700-  
3 12.

4 The agency has failed to meet its obligation to make its  
5 regulatory requirements sufficient clear to those who diligently  
6 attempt to comply with the law. Not only did the number assigned  
7 to Boyer fail to alert KPC that it was for RCRA activity, it was  
8 so similar to a PCB identification number that it invited confu-  
9 sion on the part of all parties. KPC attempted to obtain the  
10 proper number from Boyer and had in fact obtained a number that  
11 had the exact format that the expected EPA identification number  
12 should have had. What the complainant now asserts as a violation  
13 of the regulations is actually the result of KPC's excusable  
14 reliance on an identification number that the agency formatted to  
15 resemble the one it asserts should have been requested by Boyer.  
16 Although it would be simple for the agency to issue identifica-  
17 tion numbers that can be readily associated with the appropriate  
18 regulatory program, it has decided to issue numbers in a common  
19 format and with the maximum potential for confusion. Due process  
20 requires the government to act reasonably in describing the  
21 regulatory requirements that it imposes and to refrain from  
22 punishing those inadvertently deceived by the government's  
23 failure to describe requirements clearly. See Santos v. Frank-  
24 lin, 493 F. Supp. 847, 852-54 (E.D. Pa. 1980). Since the agency  
25 failed to issue its identification numbers in a manner that would  
26 have alerted KPC that Boyer did not have the proper identifica-  
27  
28

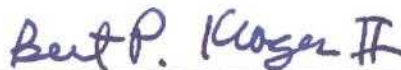
BERT P. KRAGES II  
ATTORNEY AT LAW  
900 S.W. FIFTH AVENUE, SUITE 1900  
PORTLAND, OREGON 97204  
TELEPHONE (503) 226-3662 FACSIMILE (503) 273-9135

tion number, and since KPC made the appropriate inquiry to Boyer, count five of the complaint should be dismissed.

### CONCLUSION

Due process requires agencies to provide fair notice to citizens of the conduct that is required of them. With respect to the conduct at issue in the present action, the agency failed to provide any guidance as to how annual document logs and annual documents are to be developed. The agency also chose to issue an identification number that was deceptively similar to those issued under an analogous program and thus invited confusion on the part of the regulated parties. Under these circumstances, it is inappropriate to punish KPC for its good faith intent to satisfy requirements that were unascertainable as implemented by the agency. Therefore, the complaint should be dismissed.

Respectfully Submitted,



Bert P. Krages II  
Attorney for Ketchikan Pulp Company



Docket No. 1094-04-07-2615

CERTIFICATE OF SERVICE

I certify that the foregoing Cross Motion for Partial Accelerated Decision and Response to Complainant's Motions was delivered as follows:

Original by first class mail:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue  
Seattle, Washington 98101

Copies by first class mail:

Frank W. Vanderheyden  
Administrative Law Judge  
U.S. Environmental Protection Agency  
Mail Code 1900  
401 M Street, S.W.  
Washington, D.C. 20460

Margaret B. Silver  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue  
Seattle, Washington 98101

Dated: September 1, 1995

Burt B. Karger II

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	[TSCA]
KETCHIKAN PULP COMPANY	)	Docket No. 1094-04-07-2615
Respondent	)	AFFIDAVIT OF CYRIL J. YOUNG
	)	
	)	
STATE OF ALASKA	)	
	)	ss.
BOROUGH OF KETCHIKAN GATEWAY	)	

I, Cyril J. Young, being first duly sworn deposes and says:

1. I have been the Assistant Director of Environmental Control for Ketchikan Pulp Company (KPC) since 1990. I am responsible for administering the compliance activities with respect to PCB removal, disposal, and recordkeeping.
2. KPC has undertaken a program over the last few years of the phased removal of all PCB containing equipment from its operations. The management of PCBs is taken seriously at KPC, and considerable effort has been expended to monitor, label, and replace equipment that contain PCBs.
3. I am responsible for preparing the annual document log and complying with the annual records requirements of the TSCA regulations set forth at 40 C.F.R. Part 761. I am also responsible for overseeing the shipment of PCB containing materials off KPC premises for disposal.

4. The preparation of PCB annual document logs involves a thorough and considered evaluation of all the sources of information about PCBs at KPC. Before 1994, the U.S. Environmental Protection Agency (EPA) had not provided KPC formal or informal guidance regarding the formatting and preparation of annual document logs. Absent such guidance, I prepared a log that consisted of a volume that contained a memorandum and attached documents and an adjacent volume of the manifests that were referenced in the first volume. These annual document logs provided a readily accessible source of the information described in 40 C.F.R. §761.180(a).

5. The KPC pulp mill has capacitors that, because of their sealed design and lack of documentation, cannot be conclusively classified as either small or large capacitors as defined by 40 C.F.R. §761.3. For the purposes of recordkeeping, KPC assumes that these units qualify as large capacitors.

6. In 1994, the Region 10 office of EPA requested that KPC adopt a format that the Office had developed for PCB annual document logs. Pursuant to its general policy to follow Agency guidance, KPC reformatted its annual document logs.

7. KPC has used the services of Boyer Alaska Barge Line, Inc. (Boyer) for several years. Boyer has been a reliable and dependable provider of transportation services. KPC has used this company many times to ship hazardous wastes to disposal facilities and has never had problems associated with any of the shipments.

8. In 1991 and 1992, KPC hired Boyer to transport to a disposal facility in the State of Washington several transformers and containers that contained PCBs. As its identification number, Boyer provided to KPC the number "AKD126916782." This number had been issued by EPA, apparently under the auspices of the RCRA program.



9. All the material that was transported by Boyer in 1991 and 1992 reached the disposal facility without incident.

  
CYRIL J. YOUNG

STATE OF ALASKA                     )  
  )  
FIRST JUDICIAL DISTRICT        )     ss:

SUBSCRIBED AND SWORN TO before me this 30th Day of  
August, 1995.

  
\_\_\_\_\_  
Notary Public for Alaska  
My commission expires 02/23/99